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No. 87-1369

In the Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD A. LAFORTE AND RICKEY A. ROGERS,
PETITIONERS

v.

CONSTANCE HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly determined that the formula established by the Civil Service Commission for determining overtime rates of pay for federal firefighters complies with the requirements of the Fair Labor Standards Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 833 F.2d 977. The opinion of the district court (Pet. App. 30a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on November 17, 1987. The court of appeals denied petitioners' suggestion for rehearing en banc on December 23, 1987. The petition for a writ of certiorari was filed on February 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal government, as employer, became subject to the Fair Labor Standards Act of 1938 (FLSA), 29

U.S.C. (& Supp. III) 201 *et seq.*, in 1974. With respect to most covered employees, the FLSA provides that an employee must be paid overtime for all hours of work in excess of 40 hours per week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. 207(a)(1). In recognition of the fact that firefighters typically do not work a 40-hour week but, rather, generally are required both to perform work and to remain at their duty stations on standby during their work shifts, Congress enacted a special overtime pay provision applicable to firefighters. Under that provision, 29 U.S.C. 207(k), firefighters receive FLSA overtime pay for the hours they are on duty in excess of 106 hours in a two-week period.[1]

Congress instructed the Civil Service Commission, predecessor to the Office of Personnel Management, to apply the FLSA in the federal sector consistently with its application by the Department of Labor in other sectors. H.R. Rep. 93-913, 93d Cong., 2d Sess. 28 (1974). In January 1975, the Commission issued Federal Personnel Manual (FPM) Letter No. 551-5 (Jan. 15, 1975) (excerpted at Pet. App. 52a-63a), which provided instructions for applying the FLSA to federal firefighters. Because FLSA overtime is to be paid at the rate of one and one-half times the "regular rate of pay," which the FLSA defines as "includ[ing] all remuneration for employment paid to, or on

[1] Section 207(k) directed the Secretary of Labor to perform a study to determine the average number of hours firefighters were on duty in 1975, and it provided that firefighters must receive overtime for duty hours in excess of the lesser of 216 hours per 28-day period or the number of duty hours determined by the Secretary's study. The Secretary found that firefighters averaged 212 hours of duty per 28-day period (48 Fed. Reg. 40518-40519 (1983)). As a result, federal firefighters are entitled to overtime pay for all hours that they are on duty in excess of 106 hours per two-week period.

behalf of, the employee" (29 U.S.C. 207(e)), it was necessary for the Commission to establish a formula for computing a firefighter's regular rate of pay. FPM Letter No. 551-5 instructed that a federal firefighter's regular rate of pay for a pay period is the General Schedule (GS) pay (basic pay) the firefighter received, plus certain standby duty pay received pursuant to 5 U.S.C. 5545(c)(1) (premium pay),[2] divided by the number of hours per work period that the firefighter is regularly on duty. After the regular rate is calculated, the amount of FLSA overtime pay due a firefighter is determined by multiplying one-half the regular rate times the number of FLSA overtime hours. An additional one-half is paid because " 'the employee has already been compensated a hundred percent for all hours in his tour of duty' " (Pet. App. 34a (quoting FPM Letter No. 551-5)). Thus, when paid half again, firefighters receive in total one and one-half times the regular rate for the hours they were on duty in excess of 106 during a two-week period.

Petitioners were federal firefighters in January 1984. At that time, they were regularly scheduled to be on duty for six 24-hour shifts, for a total of 144 hours, during each two-week work period. During a shift, petitioners worked for eight hours and were on standby for 16 hours. Pet. App. 2a. As they note (Pet. 6 n.3), they received $530.40 in basic pay and $132.80 in premium pay for each two-week period. Pursuant to the formula established by the Civil Service Commission, their regular rate of pay was $4.60 per hour (($530.40 basic pay + $132.80 premium pay)/144 hours). Because they regularly were scheduled for 38 hours of overtime duty (144 hours − 106 hours)

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[2] Federal firefighters receive premium pay pursuant to Section 5545(c)(1) because they are required to be on standby for substantial periods.

during a two-week period, they were entitled to $87.40 in FLSA overtime pay for that period (½ × $4.60 × 38 hours). Accordingly, they received $750.60 for each two-week period ($530.40 basic pay + $132.80 premium pay + $87.40 FLSA overtime pay). It is perhaps more intuitively understandable to view their total pay as representing approximately $488 for 106 hours at the regular rate of $4.60 and $262 for 38 hours of FLSA overtime at the rate of $6.90 (1½ × $4.60).[3]

2. Petitioners, who do not quarrel with the regular rate calculation set forth in FPM Letter No. 551-5, filed this suit contending that they are entitled to FLSA overtime pay in excess of the "half again" payment mandated by FPM Letter No. 551-5. They argue that under 5 U.S.C. 5504(b), which, until it was amended in 1986 (Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 15203, 100 Stat. 334), provided that "[f]or pay computation purposes affecting an employee, the annual rate of basic pay established by or under statute is deemed payment for employment during 52 basic administrative workweeks of 40 hours," their basic pay must be viewed as compensation for the first 80 hours of duty only. In the court below, they further argued that the premium pay received under Section 5545(c)(1) must be viewed as compensation for all 144 hours of duty. Thus, the court of appeals explained, under petitioners' approach, in each of the first 80 hours of duty during a two-week period a firefighter "would receive 1/80th of his basic GS pay for the 2-week period and 1/144th of his

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[3] For 106 hours at $4.60 per hour, petitioners would receive $487.60, and for 38 hours at $6.90 petitioners would receive $262.20, for a total of $749.80. The 80-cent difference between the total pay calculated in that manner and the total pay calculated by the formula in FPM Letter No. 551-5 is due to rounding the regular rate to $4.60.

premium pay for the 2-week period. For each of the next 26 hours, he would only receive 1/144th of his premium pay. Finally, for the last 38 hours, he would be deemed to receive 1/144th of his premium pay and sufficient additional pay to bring the total compensation for each of those 38 hours to equal his regular rate of pay times one and one-half." Pet. App. 8a n.4. Under that approach, petitioners were "underpaid for each of the last 38 hours of each 2-week work period by an amount equal to the difference between their regular rate of pay and 1/144th of their premium pay for the 2-week period" (*ibid.*).

The district court recognized that the Federal Circuit had upheld the calculation method set forth in FPM Letter No. 551-5 in *Zumerling* v. *Devine*, 769 F.2d 745 (1985), and accordingly entered judgment in favor of the government. In *Zumerling*, the court concluded, with respect to the regular rate calculation, that "it appears reasonable that the regular rate is to indicate the typical hourly wage paid, and OPM's equation merely reflects this fact" (*id.* at 751). It also rejected the contention that FPM Letter No. 551-5 conflicts with the statute because it provides that the amount of FLSA overtime pay should be calculated by multiplying half the regular rate times the number of overtime hours of duty, explaining that "[b]y receiving an additional one-half pay, the employee receives in total one and one-half times the regular rate at which he is employed" for overtime duty (*id.* at 752). The district court here further noted, with respect to petitioners' calculation method, that "it is illogical to find that basic pay for firefighters is only for 80 hours work and not for the total hours worked, that number being 144" (Pet. App. 35a). It dismissed petitioners' reliance on the sentence deleted in 1986 from Section 5504(b), noting that Section 5504(b) "was promulgated to enable employees to compute their annual rate of basic pay to a 'basic hourly, daily, weekly, or bi-

weekly rate' only and is not a factor in determining the 'regular rate' " (Pet. App. 36a).

The court of appeals affirmed (Pet. App. 1a-29a). It recognized, following *Zumerling*, that, contrary to petitioners, " 'employees receive their regular rate of pay for each of the 144 hours they work' " (*id.* at 10a (quoting 769 F.2d at 752)). It concluded that petitioners were attempting to read far too much into the sentence deleted from Section 5504(b), noting that the provision is "entitled 'Computation of Hourly Rates of Pay,' which appears to confirm that section 5504(b) was never intended to do anything more than provide a method to enable employees receiving annual pay to calculate a corresponding hourly, daily, or weekly rate" (Pet. App. 14a). In contrast to the "entirely reasonable" computation method set forth in FPM Letter No. 551-5, the court found "the computation formula proposed by appellants * * * to be confusing, to say the least, and perhaps unworkable" (*id.* at 13a). It concluded that the case represented "one more attempt by federal firefighters to gain a pay windfall through creative mathematics rather than from the intentions of Congress" (*id.* at 14a).[4]

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court

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[4] Senior Judge Bennett dissented. He did not agree (Pet. App. 27a) with petitioners' proposed calculation method. Rather, in his view firefighters' "basic pay should be considered payment only for the first 80 hours in each scheduled 144-hour work period and their premium pay properly should be considered payment only for the last 64 hours of each scheduled work period" (*id.* at 21a). Under that approach, "the proper offset for appellants' premium pay already received should be 1/64th of the premium pay, not 1/144th of it as urged by" petitioners (*id.* at 27a).

of appeals. This Court recently denied certiorari in an almost identical case.[5] Further review is not warranted.

1. As the Federal Circuit recognized in *Zumerling* and in this case, the method set forth in FPM Letter No. 551-5 for calculating the FLSA overtime pay due federal firefighters is correct. The proper starting point for determining how the FLSA affects federal firefighters is to calculate the firefighters' regular hourly rate of pay absent application of the FLSA. Dividing the total regular pay a firefighter would receive by the total number of hours for which that pay was received, as FPM Letter No. 551-5 requires, is a perfectly straightforward way of calculating a firefighter's regular hourly rate of pay. Giving the firefighter, in addition to his total regular pay, a further one-half of his hourly rate for each of his FLSA overtime hours plainly results in pay at the rate of one and one-half times the regular rate for those hours. The method devised by the Civil Service Commission thus accurately gives effect to Congress's purpose in applying the FLSA to the federal government. Under the calculation method set forth in FPM Letter No. 551-5, federal firefighters' pay is increased so that they are paid at the rate of one and one-

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[5] The petitioners in *Wheeler* v. *United States*, cert. denied, No. 86-1000 (Mar. 9, 1987), were also federal firefighters who challenged the calculation method for FLSA overtime pay established in FPM Letter No. 551-5. The Claims Court had rejected their contentions (9 Cl. Ct. 579 (1986)), which were very similar to petitioners' contentions, in light of *Zumerling*, and the Federal Circuit had summarily affirmed (No. 86-1043 (Sept. 18, 1986)). In addition, the plaintiffs in *Slugocki* v. *United States*, 816 F.2d 1572 (Fed. Cir. 1987), unsuccessfully challenged the calculation method established in FPM Letter No. 551-5 for federal law enforcement officers, who are treated similarly to federal firefighters under 29 U.S.C. 207(k), and this Court also denied their petition for a writ of certiorari (No. 87-361 (Dec. 7, 1987)).

during the half times the regular rate for the hours they are on duty in excess of 106 in a pay period.[6]

Petitioners' proposed calculation method, in contrast, does not accurately reflect the regular hourly wage earned by federal firefighters absent application of the FLSA, but instead artificially inflates their total pay by unreasonably allocating certain pay to certain hours. Petitioners' proposal, as explained by the court of appeals (Pet. App. 8a n.4), is to allocate firefighters' basic pay to the first 80 hours of duty during a two-week period and to allocate the premium pay received under 5 U.S.C. 5545(c)(1) to each of the 144 hours of regular duty. Under that approach, firefighters like petitioners would be deemed to have received $7.55 for each of their first 80 hours of work during a pay period (($530.40 (basic pay)/80 hours) + ($132.80 (premium pay)/144 hours)). Of course, they would not receive $7.55 per hour absent application of the FLSA, but instead would receive their regular rate, $4.60 per hour, for each of those hours of duty. Furthermore, under petitioners' calculation method firefighters would be deemed to receive only a fraction of their premium pay

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[6] The point can be illustrated by the example of an ordinary employee who worked 50 hours per week before the FLSA became applicable to him and who, after the FLSA became applicable, continued to work 50 hours per week, of which 40 hours are deemed (by the FLSA) to be regular time and ten hours are overtime. If the employee's pre-FLSA weekly salary was $200 per week, then he clearly was paid at the rate of $4 per hour. After application of the FLSA, he would have to be paid at the overtime rate of one and one-half times the regular rate for the hours worked in excess of 40 hours per week. Thus, after application of the FLSA, he would be paid $4 per hour for 40 hours and $6 per hour (1½ × $4) for 10 hours, for a total of $220. That could also be calculated, under the formula provided in FPM Letter No. 551-5, as the regular rate times the total number of hours worked ($4 per hour × 50 hours) plus one-half the regular rate times the number of FLSA overtime hours worked ($2 × 10 hours).

during the 26 hours of a pay period in excess of 80 hours during which, under 29 U.S.C. 207(k), firefighters do not receive FLSA overtime; during those 26 hours, under petitioners' method, they receive only 92 cents per hour ($132.80 (premium pay)/144 hours). Petitioners advance their confusing calculation method, despite the fact that it obviously distorts how firefighters are paid, because, under it, in addition to being owed half again their regular rate ($2.30) for each of their 38 hours of FLSA overtime during a pay period, they are also owed the difference between their regular rate of pay and 1/144th of their premium pay, or $3.68 per hour ($4.60 − $.92). Thus, under their method, they are owed an additional $139.84 ($3.68 × 38 hours) per pay period.[7]

Unlike petitioners' proposal, the calculation method set forth in FPM Letter No. 551-5 produces no distortions. Under FPM Letter No. 551-5, federal firefighters like petitioners are deemed to have received $4.60 per hour for each of their 144 hours of duty during a pay period, which

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[7] The calculation method proposed by the dissenting judge, while yielding less additional pay to petitioners than their method, also distorts the manner in which federal firefighters are paid. Under his proposal (Pet. App. 21a), firefighters are deemed to have received all of their basic pay (but only that pay) during the first 80 hours of a two-week period. Accordingly, they are paid $6.63 per hour ($530.40/80 hours) for those hours under his method, even though their regular rate is $4.60 per hour. Since, under the dissenting judge's method, Section 5545(c)(1) premium pay is allocated to the remaining 64 hours of duty during a pay period, under his method firefighters are deemed to have received $2.08 per hour ($132.80/64 hours) for the 26 hours in excess of 80 in a pay period for which FLSA overtime is not due under 29 U.S.C. 207(k). Under his method, petitioners are owed an additional $2.52 per hour (4.60-$2.08) for each of the last 38 hours of duty during every pay period, a total of $95.76 for the period.

is in fact what they would receive in the absence of 29 U.S.C. 207(k). Since Section 207(k) calls for them to receive one and one-half times their regular rate for their last 38 hours of duty, FPM Letter No. 551-5 properly provides that they should receive half again their regular rate for each of those hours. The formula set forth in FPM Letter No. 551-5 is plainly superior to the "confusing," "creative mathematics" proposed by petitioners (Pet. App. 13a, 14a).

The courts below correctly rejected petitioners' contention that the distortions their calculation method produces are mandated by the recently-deleted first sentence of 5 U.S.C. 5504(b). Unlike 29 U.S.C. 207(k), that provision does not apply specifically to firefighters but, as the lower courts explained, merely tells the bulk of federal employees how to calculate their hourly, daily, weekly, and biweekly rates. It simply has no role in defining the regular rate of pay under the FLSA. Moreover, the deletion of the sentence on which petitioners rely without comment in 1986 belies their contention that it had great significance.

Even if the calculation method set forth in FPM Letter No. 551-5 were not plainly correct, it would warrant deference as "a contemporaneous construction of [an] Act by the officials charged with the responsibility of setting its machinery in motion." *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409-410 (1975); accord *United States* v. *Clark*, 454 U.S. 555, 565 (1982) (concerning the validity of a long-standing OPM regulation interpreting a federal pay statute); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (concerning the deference due to the interpretation of the FLSA by the statute's administrator). FPM Letter No. 551-5 is a comprehensive document, covering all aspects of the entitlements of federal firefighters to overtime pay under the FLSA, and it was issued at virtually the

same time that those employees became subject to the FLSA. The Federal Circuit recognized that OPM's predecessor gave careful consideration to the statutory objectives of providing fair and reasonable compensation to federal firefighters, concluding that "OPM's interpretive guidelines 'harmonize[] with the statute's "origin and purpose," ' " as well as with the Secretary of Labor's regulations. *Zumerling*, 769 F.2d at 750 (quoting *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982)) (brackets added by quoting court). The Federal Circuit further noted in *Zumerling* (769 F.2d at 753) that "[b]y promulgating the guidelines at issue in this case, OPM has met the challenge given it by Congress. It has administered the FLSA in a most difficult situation and has done so consistent with the Secretary of Labor's regulations."[8]

2. Contrary to petitioners (Pet. 7, 11), nothing in *Bay Ridge Operating Co.* v. *Aaron,* 334 U.S. 446 (1948), or *United States* v. *Townsley,* 323 U.S. 557 (1945), neither of which involved overtime pay of federal firefighters pursuant to 29 U.S.C. 207(k), is contrary to the decisions below. The dispute in *Bay Ridge Operating Co.* concerned the calculation of the regular rate under the FLSA. The employers argued that the regular rate was the "straight time" rate paid employees for work between 8 a.m. and 5 p.m. on weekdays and 8 a.m. to 12 noon on Saturdays, without respect to any premium pay for work at different hours that the plaintiffs had received (334 U.S. at 451, 453). This Court determined that the regular rate was to be calculated by adding together all of the compensation paid to an employee during a workweek and dividing that sum

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[8] Because the Federal Circuit has exclusive jurisdiction to review claims brought under the Tucker Act (28 U.S.C. 1295(a)(2) and (3)), and claims by federal employees seeking back pay under the FLSA are almost always brought under that Act, that court has special expertise regarding such claims.

by the number of hours for which the compensation was paid (*id.* at 464), which is the manner in which the regular rates of federal firefighters are calculated. The Court went on to note that the Department of Labor had concluded that the employees were entitled "to an additional sum equal to the number of hours worked for one employer in a workweek in excess of forty, multiplied by one-half the regular rate of pay" and concluded that "[o]n the record before us, that interpretation seems to be a reasonable one" (*id.* at 476-477). The "half again" calculation method approved by the Court is precisely the same as the method set forth in FPM Letter No. 551-5.

This Court's decision in *Townsley* concerned employees affected by Section 23 of the Independent Offices Appropriation Act, 1935, ch. 102, 48 Stat. 522. The Court concluded that Congress's intention was to reduce the weekly hours of labor of those employees "to 40 without any pay cut" (323 U.S. at 568). Thus, when such an employee worked in excess of 40 hours in a week, he was to receive an additional one and one-half times his regular rate for the overtime hours (*id.* at 574). But here there is no indication in Section 207(k) or its legislative history that Congress intended to lower the number of hours federal firefighters were on duty while allowing them to continue to receive all the basic and premium pay they previously received.[9] Rather, Congress's intent was to provide that, for hours of duty in excess of 106 during a two-

[9] The plaintiffs in *Wheeler* v. *United States, supra*, argued that Congress intended to reduce the number of hours they worked so that their basic GS pay and Section 5545(c)(1) premium pay compensated them for the hours of duty during a pay period for which FLSA overtime did not have to be paid. That contention was rejected by the Claims Court (9 Cl. Ct. 579 (1986)), whose judgment was summarily affirmed by the Federal Circuit (No. 86-1043 (Sept. 18, 1986)), and renewed in the petition for a writ of certiorari that this Court denied (No. 86-1000 (Mar. 9, 1987)).

week period, federal firefighters would receive half again their regular rate.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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[10] Petitioners also claim (Pet. 10) that an unpublished opinion of the Comptroller General, which they have appended to their petition (Pet. App. 40a-50a), is in tension with the decisions below. The Comptroller General's opinion is of no direct relevance as the "computation of overtime under the FLSA" was not at issue (*id.* at 43a). It appears (*id.* at 41a) that the firefighters' union there argued (although the opinion is not particularly clear in this respect) that federal firefighters who are on duty for 144 hours during a two-week period are not compensated for their last 64 hours of duty and therefore should receive additional basic pay. The Comptroller General rejected that argument, noting (*id.* at 43a) that firefighters receive FLSA overtime for duty hours in excess of 106 during a two-week period and also noting (*id.* at 49a) that firefighters are compensated for the fact that they are on standby duty for substantial periods by premium pay under 5 U.S.C. 5545(c)(1). We do not understand anything in that opinion to conflict with the decision below; in any event, review by this Court would not be warranted to resolve a difference between a holding of a court of appeals and statements in an unpublished opinion of the Comptroller General.

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